

TRIBUNAL WATCH ONTARIO

STATEMENT OF CONCERN ABOUT TRIBUNALS ONTARIO

The tribunal sector of Ontario’s justice system is in crisis. The crisis was present before the COVID-19 emergency and was primarily caused by the government’s failure to re-appoint tribunal members and the continued failure to fill the vacancies with enough new appointments. Tribunals Ontario, which includes the majority of the province’s adjudicative tribunals, has lost almost half of its most experienced adjudicators and most of its tribunals can no longer fulfill their mandates or meet service standards.

The crisis is compounded by the sudden and inadequately explained departure of the Executive Chair of Tribunals Ontario in April. The resulting leadership vacuum is further compounded by the fact that many of the Associate Chair positions are filled by an Acting Associate Chair and most of these have responsibility for a number of tribunals and lack the necessary subject-matter expertise. While the leadership positions must be filled quickly, it is equally important that the selection process is credible, competitive and transparent. The Executive Chair in particular must be someone with demonstrable integrity and competence.

It is obvious that adjudicative tribunals need sufficient numbers of experienced and competent adjudicators. Appendix A to this document provides a detailed assessment of what has happened to some of the larger tribunals in Tribunals Ontario. The following shows the loss of adjudicators from 2018 to 2020 in four key tribunals:

	Full-time		Part-time		Total	
	2018	2020	2018	2020	2018	2020
Environmental Review Tribunal	6	1	6	3	12	4
Human Rights Tribunal	22	10	35	12	57	22
Landlord and Tenant Board	44	31	9	9	53	40
Social Benefits Tribunal	22	11	16	10	38	21
Total					160	87

Collectively, the tribunals in Tribunals Ontario deal with a broad range of social issues. A partial list includes:

- landlord and tenant cases
- entitlement to social benefits
- human rights
- land use and environmental issues
- compensation for people injured in motor vehicle accidents
- business licensing and consumer protection
- police complaints
- parole review
- school expulsions

- Children’s Aid interventions
- youth custody and detention review

The tribunals in Tribunals Ontario deal with tens of thousands of cases. The Landlord and Tenant Board alone receives over 80,000 applications a year. The citizens of Ontario are much more likely to have legal issues that will be dealt with by Tribunals Ontario than by the courts.

Tribunal adjudicators perform judicial functions. They must interpret legislation, weigh evidence and make legal and factual findings just as judges do. These tribunals are therefore properly understood to be *judicial* tribunals and the process for appointing and re-appointing adjudicators to judicial tribunals must be as principled as the process for appointing judges. At a minimum, decisions about re-appointments must be transparent and demonstrably free from any political interference. The process for selecting new appointees must be merit-based and competitive as required by the *Adjudicative Tribunals Accountability, Governance and Appointments Act* (“the Tribunals Act”).

The system the government inherited

The previous government established a modern tribunal appointment and reappointment system as set out in the Tribunals Act and the Directive on Appointments and Re-appointments. The key features of the system were as follows:

- A commitment to a competitive, merit-based process for appointments to tribunals
- Qualified candidates were subject to a rigorous application process conducted by the tribunal (e.g. published selection criteria, interviews, writing a sample decision).
- The Chair provided the government with a list of the most qualified candidates. Appointments were made only from that list.
- With very few exceptions, appointments were for fixed terms, starting with an initial two-year appointment, followed by a three-year re-appointment, and a final five-year appointment.
- The Chair was solely responsible for making re-appointment recommendations. These recommendations were routinely accepted by the government.

While not perfect, this system had many advantages:

- The Tribunal Chair, who is in the best position to know the tribunal’s needs, retained control over who would be appointed and re-appointed.
- People could look to tribunal adjudication as a profession with a reasonable expectation of at least 10 years of work subject to good performance. This made the position attractive to mid-career professionals with expertise in the subject matter of the tribunal and often adjudicative experience. Adjudicators were eligible for appointment to a new tribunal at the conclusion of a term, preserving the adjudicative experience for the overall system.
- The potential for partisan appointments was significantly reduced.
- Tribunals could plan on the basis of having a stable group of meritorious and experienced adjudicators.

What the present government has done

The present government has largely abandoned the system it inherited. Instead:

- Appointment recommendations from Chairs are frequently not accepted. Chairs have been pressured to consider alternate candidates proposed by the government.
- Recommendations from Chairs about the re-appointment of existing adjudicators are routinely rejected, with no explanation provided. This is the principle cause of the existing severe shortage of adjudicators.
- When re-appointments are made, they are for irregular and unpredictable terms. The length of terms has varied considerably even in the same tribunal, with no explanation for the different terms. Many new appointments have also been for irregular terms.
- Most re-appointments have been for short terms, sometimes as short as 6 months. Even Chairs and Associate Chairs have been re-appointed for short terms.

Discussion

Even before the COVID-19 emergency, the circumstances of Ontario's tribunals were already dire. The tribunals of most relevance to disadvantaged individuals were, in particular, seriously weakened. Experienced adjudicators were let go, large numbers of vacant adjudicator positions were left unfilled, and key tribunal leadership positions were either left vacant or filled with people with responsibilities for too many tribunals. The lack of any predictability about re-appointments, combined with a general demoralization about the deterioration of the sector, has necessarily caused large numbers of adjudicators to leave for less precarious employment, adding to the shortage. The precarious nature of an appointment also makes it difficult for tribunals to attract experienced, professional candidates.

Now, in the midst of a pandemic, the folly of this situation is even more evident. The numbers of the vulnerable have greatly increased, as has their need to be able to claim the protections offered by our laws. Now more than ever tribunals need a full complement of highly qualified adjudicators. Now more than ever they need leaders with the necessary subject matter and adjudicative expertise to effectively deploy resources and adjust processes to ensure procedural protections and deliver high quality outcomes. Now more than ever Tribunals Ontario needs to be led by someone with recognized expertise in tribunal leadership, someone who will be widely recognized as an impartial, non-partisan and independent guarantor of the integrity of this vital part of our administrative justice system.

The tribunals in Tribunals Ontario will play a critical role as we move forward. They will have to change how disputes are resolved and make important decisions about rights and obligations in the continually changing context of the pandemic. To do this, they need to be fully functioning. The mismanagement of Tribunals Ontario over the last two years, leading to a severe reduction in adjudicative capacity and competence, rising backlogs, demoralization of those who are left, and a leadership vacuum, means that these tribunals are nowhere near being able to function fully.

There are three things that need to be done as quickly as possible to rectify this situation.

1. Fill the leadership positions through a credible, competitive and transparent process

The position of Executive Chair of Tribunals Ontario is a critical position and must be filled quickly. However, if the process is not credible, competitive and transparent, the integrity of Tribunals Ontario will be compromised. Parties, the public, and the tribunal adjudicators will lose faith in the ability of tribunals to deliver justice. Appendix B provides a detailed discussion of this issue.

2. Restore the integrity of the appointment and re-appointment process

Tribunals need to have adequate numbers of experienced, competent adjudicators. The ongoing refusal to re-appoint adjudicators on the recommendation of the tribunal Chair or Associate Chair must stop. New adjudicators must be appointed as quickly as possible and the appointment process must at a minimum be consistent with section 14(1) of the Tribunals Act which states:

14 (1) The selection process for the appointment of members to an adjudicative tribunal shall be a competitive, merit-based process and the criteria to be applied in assessing candidates shall include the following:

1. Experience, knowledge or training in the subject matter and legal issues dealt with by the tribunal.
2. Aptitude for impartial adjudication.
3. Aptitude for applying alternative adjudicative practices and procedures that may be set out in the tribunal's rules.

3. Appointments and re-appointments must be for fixed terms

The current approach of inconsistent and mostly short terms for appointments and re-appointments will result in a serious erosion of the principle of adjudicative independence, a cornerstone of our justice system.

Those who appear before adjudicative tribunals must have confidence that the adjudicator in front of them has the necessary independence to make decisions on the basis of the law and the evidence, free from any concern that the adjudicator's continued employment is conditional on the government's approving the adjudicators decisions. This becomes especially obvious for tribunals where the government is a party.

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Tribunal Watch consists of a growing group of academics, civic leaders, advocates and past tribunal members. Our intention is to bring the present crisis to the attention of the government and the public and to continue to monitor developments in the adjudicative tribunal sector as they occur. To become involved, either publicly or anonymously, please contact

info@tribunalwatch.ca

APPENDIX A:

DETAILED REVIEW OF THE HISTORY OF APPOINTMENTS WITHIN TRIBUNALS ONTARIO 2018 – 2020

Introduction

On March 31, 2018, the Tribunals summarized below were part of three clusters of Tribunals, known respectively as Environment and Land Tribunals Ontario (ELTO), Social Justice Tribunals Ontario (SJTO) and Safety Licensing Appeals and Standards Tribunal Ontario (SLASTO). They were amalgamated into a single entity called Tribunals Ontario on January 1, 2019. The Tribunals that were part of ELTO, SJTO and SLASTO became part of similarly named divisions within Tribunals Ontario.

Altogether, there are 19 Tribunals within Tribunals Ontario. Some, such as the Landlord and Tenant Board, the Human Rights Tribunal and the Licence Appeals Tribunal, are large and handle a high volume of cases. Others of them are small and only have a tiny annual caseload.

ELTO, SJTO and SLASTO each had an Executive Chair. After the formation of Tribunals Ontario, Linda Lamoureux, who had been the Executive Chair of SLASTO, was appointed the Executive Chair of Tribunals Ontario. Ms. Lamoureux has since left and has not been replaced, although there is an acting Executive Chair, whose appointment has been neither formalized by an Order-in-Council nor recognized on the Public Appointments Secretariat website.

The Data

The Public Appointments Secretariat (PAS) maintains a current list of appointments to each of the 19 Tribunals within Tribunals Ontario. Most Tribunals have an Associate Chair (in some cases, an Associate Chair is responsible for more than one Tribunal), and a roster of Vice-chairs and/or Members, who are either full or part-time. Some Vice-chairs and Members are cross appointed to more than one Tribunal. The 2020 data, which is included in the charts that follow, is derived from the list of appointments on the PAS website as of April 30, 2020.

The appointments for each of the Tribunals as of March 31, 2018 is also summarized in the charts below. The 2018 data comes from the 2017-2018 annual reports for ELTO, SJTO and SLASTO.

The charts are organized by Division. For each Division, there is a chart comparing the number of persons appointed to the respective Tribunals within the Division in 2018 to the number appointed in 2020. For almost every Tribunal, the number of appointees is significantly lower in 2020.

It was possible to get a more detailed comparison of the appointees to the Tribunals within the Environment and Land Division and the Social Justice Division. The corresponding data for the individual Tribunals within the Safety, Licensing Appeals and Standards Division was not available because the SLASTO 2017-2018 annual report provides only the names of the individuals appointed, and the Tribunal (or Tribunals) to which they were appointed. The ELTO

and SJTO 2017-2018 annual reports also provide, for each appointee, detailed information on the type of the appointment or appointments (i.e., Associate Chair, Vice-chair or Member) and whether it was a full or part-time appointment.

As a rule, the appointments listed in the PAS website were taken at face value. However, there are certain cross appointments of individuals, where the appointees have done no or minimal work for the Tribunal to which they are cross appointed. Specifically, there are four individuals – one of whom is the current Acting Executive Chair – who are cross-appointed to either all, or all but one, of the 19 Tribunals within Tribunals Ontario. The cross-appointments are as “Vice-Chair (Part-Time).” These Vice-Chair (Part-Time) appointments are not included in the counts of part-time appointments in 2020 unless there was some indication that the appointee had, in fact, fulfilled an adjudicative role in the particular Tribunal.

Environment and Land Division

Overview						
	Full-time		Part-time		Total	
	2018	2020	2018	2020	2018	2020
Assessment Review Board	11	8	15	8	26	16
Board of Negotiation	0	0	7	5	7	5
Conservation Review Board	0	0	4	1	4	1
Environmental Review Tribunal	6	1	6	3	12	4
Local Planning Appeal Tribunal	18	21	7	7	25	28
Mining and Lands Tribunal ¹	0	0	0	0	0	0
Total	35	30	39	19	74	54

¹The Public Appointment Secretariat website states that one Associate Chair and three Vice-chairs are currently appointed to the **Mining and Lands Tribunal** on a part-time basis. These four individuals were full-time appointees of other Tribunals and there is no indication that they have done any work for this Tribunal since their respective appointments. Accordingly, they are not included in the count.

Assessment Review Board

	March 31, 2018	April 30, 2020
Associate Chair	1	0
Vice-chairs (full-time)	3	2
Vice-chairs (part-time) ²	0	1
Members (full-time)	6	6
Members (part-time)	16	7
Total	26	16

²One of the part-time Vice-Chairs (a full-time Vice-Chair with the Licensing Appeal Tribunal) is identified in decisions recently released on CanLII as the Acting Associate Chair of the Assessment Review Board. She is also identified as the Acting Associate Chair of the Environmental Review Tribunal in a small number of decisions from that Tribunal.

Board of Negotiation

	March 31, 2018	April 30, 2020
Associate Chair (part-time) ³	0	1
Vice-chairs (full-time)	0	0
Vice-chairs (part-time)	0	1
Members (full-time)	0	0
Members (part-time)	7	3
Total	7	5

³The Public Appointments Secretariat website lists a part-time Associate Chair for the Board of Negotiations. This individual is the Associate Chair of the Licence Appeals Tribunal and the Ontario Civilian Police Commission.

Conservation Review Board

	March 31, 2018	April 30, 2020
Associate Chair (part-time)	1	0
Vice-chairs (full-time)	0	0
Vice-chairs (part-time)	1	0
Members (full-time)	0	0
Members (part-time)	2	1
Total	4	1

Environmental Review Tribunal

	March 31, 2018	April 30, 2020
Associate Chair	1	0
Vice-chairs (full-time)	3	0
Vice-chairs (part-time) ²	1	1
Members (full-time)	2	1
Members (part-time)	5	2
Total	12	4

Local Planning Appeal Tribunal (formerly the Ontario Municipal Board)

	March 31, 2018	April 30, 2020
Associate Chair	1	1
Vice-chairs (full-time)	5	5
Vice-chairs (part-time) ¹⁰	0	0
Members (full-time)	12	15
Members (part-time)	7	7
Total	25	28

Social Justice Division

Overview						
	Full-time		Part-time		Total	
	2018	2020	2018	2020	2018	2020
Child and Family Services Review Board ⁴	2	2	20	10	22	12
Criminal Injuries Compensation Board	3	1	22	15	25	18
Human Rights Tribunal	22	10	35	12	57	22
Landlord and Tenant Board	44	31	9	9	53	40
Ontario Special Education Tribunals	1	0	4	2	5	2
Social Benefits Tribunal	22	11	16	10	38	21
Total	94	55	105	58	199	113

⁴The individuals appointed to the Child and Family Services Review Board are also appointed to the Custody Review Board. The two Boards are not listed separately.

Child and Family Services Review Board/Custody Review Board

	March 31, 2018	April 30, 2020
Associate Chair	1	0
Vice-chairs (full-time)	1	1
Vice-chairs (part-time)	0	0
Members (full-time)	0	1
Members (part-time)	20	10
Total	22	12

Criminal Injuries Compensation Review Board

	March 31, 2018	April 30, 2020
Associate Chair	1	1
Vice-chairs (full-time)	2	0
Vice-chairs (part-time)	0	1
Members (full-time)	0	0
Members (part-time)	22	15
Total	22	17

Human Rights Tribunal

	March 31, 2018	April 30, 2020
Associate Chair	1	0
Vice-chairs (full-time) ⁶	21	6
Vice-chairs (part-time) ⁷	1	0
Members (full-time)	0	4
Members (part-time)	34	12
Total	57	22

⁶One of the full-time Vice-chairs of the HRTO on March 31, 2018 was also the Associate Chair of the CFSRB. However, at the time, the CBSRB was processing and adjudicating applications to the HRTO filed on behalf of minors.

⁷The PAS website lists eight part-time Vice-chairs, all of whom are cross appointed to other Tribunals. One of these eight Vice-chairs was identified as the Acting Associate Chair of the Human Rights Tribunal in the months following the departure of the Associate Chair in the fall of 2019. However, she has since been named as the Acting Executive Chair, and it is assumed that she is doing no Vice-chair work for this Tribunal.

Landlord and Tenant Board

	March 31, 2018	April 30, 2020
Associate Chair	1	1
Vice-chairs (full-time) ⁸	6	6
Vice-chairs (part-time)	0	0
Members (full-time)	37	24
Members (part-time)	9	9
Total	53	40

⁸Although there are seven Vice-chairs on the Public Appointment Secretariat website, one of them does not do any work for the LTB.

Social Benefits Tribunal

	March 31, 2018	April 30, 2020
Associate Chair	1	0
Vice-chairs (full-time)	3	3
Vice-chairs (part-time)	0	0
Members (full-time)	18	8
Members (part-time)	16	10
Total	38	21

Safety, Licensing Appeals and Standards Division

	Full-time		Part-time		Total	
	2018	2020	2018	2020	2018	2020
Animal Care Review Board ⁹	n.a.	0	n.a.	26	31	26
Fire Safety Commission	n.a.	0	n.a.	23	30	23
Licence Appeal Tribunal	n.a.	39	n.a.	35	96	74
Ontario Civilian Police Commission ¹⁰	n.a.	0	n.a.	12	22	12
Ontario Parole Board ¹¹	n.a.	2	n.a.	25	52	27
Total		41		121	231	162

⁹Except for one person, the Animal Care Review Board and the Fire Safety Commission are comprised of the same appointees, most of whom are also cross appointed to the Licensing Appeals Tribunal.

¹⁰As of March 31, 2018, 16 of the 22 appointees to the Ontario Civilian Police Commission were cross appointed to the Licensing Appeals Tribunal. By 2020, all the appointees were cross-appointments to the Licensing Appeals Tribunal.

¹¹As of March 31, 2018, 30 of the 52 appointees to the Ontario Parole Board were cross appointed to the Licensing Appeals Tribunal. In 2020, 19 of the 27 appointees are cross appointed to the Licensing Appeals Tribunal.

APPENDIX B:

PROPOSED PROCESS FOR APPOINTMENT OF THE EXECUTIVE CHAIR OF TRIBUNALS ONTARIO

Ontario's *Adjudicative Tribunals Accountability, Governance and Appointments Act* permits the government to group adjudicative tribunals into a 'cluster' headed by a single Executive Chair. That individual then, by statute, is given the powers that formerly vested in the Chairs of all of the clustered tribunals.

The current government has taken the extraordinary step of putting 19 of Ontario's 32 adjudicative tribunals into a single cluster (Tribunals Ontario). It has thereby given that cluster's Executive Chair the powers and duties that previously vested in a very large number of individual Chairs.

Apart from all of the important daily functions of a tribunal chair in terms of decision quality, case assignments, professional development, budgeting and a myriad of others, the *Act* gives the Executive Chair a veto over appointments and re-appointments of all of the cluster's adjudicators (ss. 14(4) of the *Tribunals Act*). In the case of Tribunals Ontario, this applies to some 400 appointees. The Executive Chair may, but need not, delegate this power to one or more of the Associate Chairs within the cluster.

The sheer numbers show the enormous power of that position over the appointments of hundreds of people empowered to make binding legal findings affecting a vast array of rights and obligations. They also show the unreasonableness of having a single Executive Chair for so many tribunals, but that is an issue for another day.

Of immediate and urgent concern is the compelling need for a credible, competitive and transparent process for the selection of a person with such extraordinary powers, and anyone to whom such powers may be delegated. Indeed, even if fewer tribunals are placed within a cluster, or where an adjudicative tribunal outside a cluster has its own Chair, the need for objectivity in the selection of an Executive Chair or Chair cannot reasonably be resisted. The same kind of process could be optional for the appointment of Associate Chairs within a cluster provided that an Executive Chair's appointment or reappointment powers could be delegated only to Associate Chairs who had been selected through it.

While the current Attorney General has shown discomfort with the highly regarded process in place for some three decades for the appointment of Ontario Court judges, that process stands as a tested starting point for the development of a process for Ontario's adjudicative tribunals.

Set out below is an initial outline of how that model (see s. 43 of the *Courts of Justice Act*) could be made applicable to the appointment of Executive Chairs who head-up clusters of tribunals. With possibly some modifications to reflect subject-matter expertise, the same general approach could be used for the selection of Chairs or Associate Chairs of individual tribunals.

In brief, the salient elements of a process drawn from that model would be:

- The establishment of an independent appointments advisory body that includes members nominated collectively by existing tribunal leaders; members nominated by designated legal system organizations; and members nominated by the government. As is the case for Ontario Court judges, there should be an explicit requirement that the overall composition of the body reflect “Ontario’s linguistic duality and the diversity of its population and ensuring overall gender balance shall be recognized”;
- Recruitment of Executive Chairs would be conducted by that committee using an open, advertised and competitive process based on published criteria that include an assessment of adjudicative experience, professional excellence, management competencies, community awareness and personal characteristics of candidates, as well as recognition of the desirability of reflecting the diversity of Ontario society in tribunal appointments;
- Following the interview process, the committee would provide the Attorney General a ranked list of candidates. For judges, this list may contain as few as 2 names (a number the Attorney General has sought to increase). For an Executive Chair the minimum number could reasonably be greater but should not exceed 5;
- The Attorney General would then be required to recommend to Cabinet the appointment of someone from that list unless he or she rejected the entire list and required the provision of a new one;
- Although not included in the process for appointing judges, perhaps because there are so many appointments to be made each year, the fact that the list was rejected and the generic reasons for that rejection should be made public. Rejection of an entire list should also generally require a fresh advertisement and selection process rather than having the committee dip again into the original candidate pool.